SUPREME COURT OF THE UNITED STATES.

No. 278.

THE UNITED STATES, APPELLANTS,

vs.

JOSIAH F. CROSBY, SIMEON HART, HENRY S. GILLETT, AND JOHN S. GILLETT.

APPEAL FROM SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

	Original.	Print
Transcript from district court	2	1
Libel	3	1
Bill of exceptions	17	8
Decree	36	17
Proceedings in supreme court	39	18
Assignment of errors	42	20
Joinder in error	43	21
Final decree	45	21
Appeal	46	22
Clerk's certificate	47	23

1 Pleas begun and held in the supreme court of the Territory of New Mexico, at the January term, A. D. 1866, at the city of Santa Fe, Mexico.

Among the proceedings of said court at the above term, on the fourth day of said term, it being the fourth day of January, A. D. 1866.

Present: Hon. Kirby Benedict, chief justice; Hon. Sydney A. Hubbell, associate justice; Hon. Joab Houghton, associate justice; Hon. Theodore D. Wheaton, dist. attorney; Jose D. Lena, esq., sheriff of Santa Fe county; Sam'l Ellison, esq., clerk of court.

THE PROPERTY of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, situate in El Paso county, Texas, appellants,

vs.

THE UNITED STATES, appellee.

Appeal from the 3d judicial district, Dona Ana county, Justice Houghton presiding.

And now on this day came the appellants by Messrs. Clever and Elkins, their attorneys, and move the court for leave to file
2 the transcript of the proceedings of the court below, which leave is granted, and said cause placed upon the docket of this court.

And be it further remembered that, on the said fourth day of January, A. D. 1866, the following transcript was filed in open court, which said transcript is in words and figures following, to wit:

In the district court of the United States for the third judicial district of the Territory of New Mexico.

UNITED STATES OF AMERICA, *Territory of New Mexico:*

Be it remembered that on the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-five, that Theodore D. Wheaton, esq., district attorney of the United States for the Territory of New Mexico, filed with the clerk of this court a libel, which is in words and figures following, to wit:

3 *Libel.*

In the district court of the United States for said Territory and district, at the November term, A. D. 1865.

UNITED STATES

vs.

A CERTAIN seven-eighths interest in and to a certain grant or tract of land, known as the Ponce grant, upon a portion of which is situated the town of Franklin, in El Paso county, State of Texas; also an undivided seven-eighths, twenty-nine whole blocks, and forty separate lots in said town of Franklin; also survey No. 146, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett.

UNITED STATES OF AMERICA,
Territory of New Mexico, Third Judicial District:

Be it remembered that Theodore D. Wheaton, United States district attorney for the Territory of New Mexico, who prosecutes for the United States, comes before the honorable court at the day and date aforesaid, and on the part of the United States shows to the hon. court, and gives the hon. court to understand and be informed that Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, of the county of El Paso, in the State of Texas, within the jurisdiction of the district court aforesaid heretofore, to wit: On the first of March, in the year of our Lord one thousand eight hundred and sixty-two, within the jurisdiction of the district court aforesaid, then and there, citizens of the United States, and rightfully subjected to the authority and laws thereof, were seized and possessed of certain lands, town lots, &c., in the county of El Paso, State of Texas, known as an undivided seven-eighths of a certain grant or tract of land known as the Ponce grant, upon a portion of which is situated the town of Franklin, El Paso county, Texas, bounded on the north by surveys No. 146 and No. 9; on the east by the land of James McGoffin; on the south by the Rio Grande, and on the west by the lands of Simeon Hart; also the whole of survey No. 146, with the exception of that portion within the limits of the town site of the town of Franklin, Texas; also an undivided seven-eighths of the following lots in the town of Franklin, Texas: Lots No. 2, 3, 4, 5, and 6 in block No. 1; lots No. 8, 9, 10, and 11 in block No. 2; lots No. 14, 15, and 17 in block No. 3; lots No. 19, 23, and 24 in block No. 4; lots No. 25 and 26 in block No. 5. The whole of blocks No. 7, 8, 9, and 10. Lots No. 60, 61, and 62 in block No. 11; lots No. 69, 70, and 74 in block No. 13; lots No. 84, 85, and 9 in block 15; lots No. 95 and 96 in block No. 17; lots No. 101, 102, 103, and 104 in block No. 18; lots No. 130 and 137 in block 27; lots No. 131 and 136 in block No. 28; lots No. 122, 128, and 133 in block No. 30.

The whole of blocks No. 12, 19, 20, 21, 22, 23, 24, 25, 29, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, said property mentioned and referred to in the information herein laid, is known as the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, which said real estate since that time and after the committing of the several unlawful acts hereinafter alleged to have been committed by the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, has been seized by the marshal of the United States for said Territory of New Mexico, and is still in his custody and possession.

The libellant would further propound and show to the hon. court that *that* the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, afterwards, to wit, on the day and year first aforesaid, within the jurisdiction of the court aforesaid, and also on divers other days and times from that time to the filing of this libel, being then and there citizens of the United States, and subjected to

the authority and laws of said United States, being engaged in an armed rebellion against the said government of the United States, commenced and set on foot within the jurisdiction of said court, consisting of some ten thousand men, and commanded by one
6 Henry H. Sibley, have not ceased to countenance said rebellion, nor have they returned to their allegiance to the said United States, although public warning and proclamation has been duly given and made by the President of the said United States to that effect, as by reference to the same, dated the twenty-fifth day of July, in *in* the year of our Lord one thousand eight hundred and sixty-two, will more fully appear; and the libellant would further show and propound to the hon. court that the Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, afterwards, to wit, on the day and year aforesaid, within the jurisdiction of the court aforesaid, having been engaged in aiding and abetting said armed rebellion by buying, selling, freighting, trading, and trafficking to and with, and by furnishing council, personal service, and supplies of all kinds to the persons there employed, have not ceased to aid and assist said rebellion, nor have they returned to their allegiance to the United States, although public proclamation has been made by the President of the United States aforesaid to that effect.

The libellant would further propound and show to the hon. court, that the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, of the county and State aforesaid, on the day and year aforesaid, and during other days and times from thence
7 hitherto, having been engaged in a certain other armed rebellion against the government of the United States, to wit, an armed invasion of the said Territory of New Mexico, consisting of some two thousand men, and afterwards set on foot and carried on by the so-styled Confederate States of America, have not ceased to countenance said rebellion, nor have they returned to their allegiance to the said United States, although public warning and proclamation has been duly given and made as aforesaid; and the libellant would further propound to the hon. court, that the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, afterwards, to wit, on the day and year first aforesaid, at the district aforesaid, being engaged in aiding or abetting the armed rebellion last aforesaid, with personal service, counsel, information, and supplies of all kinds, have not ceased from thence hitherto, so to aid and abet said last-named rebellion, nor have they returned to their allegiance to the said United States, although public warning and proclamation has been duly given and made by the President of the United States to that effect, as aforesaid, all of which acts and doing of said Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, being contrary to the statutes of the United States in such cases made and provided, whereby and by force of the statutes, in such cases
8 made and provided, the said above-described property and real estate has become justly forfeited to the United States: and the libellant would further propound and show to the hon. court, that the decree of condemnation and confiscation of right be entered

against said above-described property, and that proceedings be had according to the act of Congress of the United States approved July 17, 1862; that process and proclamation be had, and a decree of sale ordered that such disposition be made of the proceeds thereof as to the hon. court may seem just and proper in the premises on the part of the United States.

THEODORE D. WHEATON,
U. S. District Att'y.

And afterwards, to wit, on the day and year aforesaid, the clerk of said court issued the following monition, which is in words and figures following, to wit:

UNITED STATES OF AMERICA, *Territory of New Mexico:*

To the United States marshal of said Territory greeting:

Whereas certain property known and described as follows, to wit:

The property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, to wit:

9 The following property in El Paso county, State of Texas, viz: A certain seven-eighths interest in and to a certain tract or grant of the land known as the Ponce grant, upon a portion of which is situated town of Franklin in said county and State, and described as follows, to wit:

Bounded on the north by surveys No. 146 and No. 9; on the east by the land formerly of James Magoffin; on the south by the Rio Grande, and on the west by the land formerly of Simeon Hart; also the whole of survey No. 146, with the exception of that portion within the limits of the town site of Franklin, aforesaid; also an undivided seven-eighth of the following lots in the aforesaid town of Franklin, to wit:

Lots No. 2, 3, 4, 5, and 6, in block No. 1.
Lots No. 8, 9, 10, and 11, in blk. No. 2.
Lots No. 14, 15, and 17, in block No. 3.
Lots No. 19, 23, and 24, in block No. 4.
Lots No. 25 and 26, in block No. 5.
The whole of blocks No. 7, 8, 9, and 10.
Lots No. 60, 61, and 62, in block No. 11.
The whole of block No. 12.
Lots No. 69, 70, and 74, in block No. 13.
Lots No. 94, 85, and 90, in block No. 15.
Lots No. 85 and 96, in block No. 17.
Lots No. 101, 102, 103, and 104, in block No. 18.
The whole of blocks No. 19, 20, 21, 22, 23, 24, and 25.
Lots No. 130 and 137, in block No. 27.
Lots No. 131 and 136 in block No. 28.
10 The whole of block No. 29.
Lots No. 122, 128, and 133, in block No. 30.
The whole of blocks No. 31, 35, 36, 37, 38, 39, 40, 41, 42, 43,

44, 45, 46, 47, 48, 49, 50, and 51, with all the houses, corrals, &c., thereon, situated in the county of El Paso and State of Texas, and within the jurisdiction of the district court of the United States for the third judicial district of the Territory of New Mexico, has been signed by the marshal of said Territory, and that on the 23d day of September, A. D. 1865, the hon. district attorney of the United States for said Territory, practicing on the part of the United States, filed in the clerk's office of the said district court a libel, stating and alleging that Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, on the 1st day of March, A. D. 1862, and until the filing of said libel, were seized and possessed of the above-mentioned property; and that on the day and year last aforesaid, and within the jurisdiction of said court, that the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett and John S. Gillett were engaged in an armed rebellion against the government of the United States, and have not ceased to countenance said rebellion, nor have they returned to their allegiance, although public proclamation and warning has been duly given, and that the said Josiah F. Crosby, Simeon Hart,
11 Henry S. Gillett, and John S. Gillett, on the day and year last aforesaid, and within the jurisdiction of said court, had been engaged in aiding and abetting said rebellion, and had not ceased to aid and abet, and had not returned to their allegiance to the United States, although public proclamation and warning had been duly given.

Now, therefore, in the name of the President of the United States, we command you, that by public notice to be published in the Santa Fe Gazette, a newspaper published in the town of Santa Fe, New Mexico, for not less than three successive weeks, you do cause to be notified all persons and parties who may be concerned or who may claim any interest in the above-mentioned property, or know or have any thing to say why the same should not be forfeited to the United States, and condemned and sold to answer the prayer of said libel; and that you do especially summon the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett and John S. Gillett, that together with all other parties interested, to be and appear before the said United States district court, at the court house in the town of Mesilla, in said third judicial district, on the 6th day of November, 1865, at 10 o'clock, a. m., when and where said cause will be heard; then
12 and there to interpose their claims, and make allegations in that behalf.

Witness the Hon. Joab Houghton, associate justice of the supreme court of the territory of Mexico, and presiding judge of the said third judicial district, and the seal of said court, at Mesilla, N. M., this 23d day of September, A. D. 1865.

[SEAL.] SAM. J. JONES, *Clerk.*

And afterwards, to wit: at the November term, A. D. 1865, of the United States district court for the third judicial district of the Territory of New Mexico, begun and held at the court house, in the

county of Dona Ana, in said district, on the first Monday of November, A. D. 1865, the following proceedings were had and held to wit: On the 9th day of November, A. D. 1865, Abraham Cutler, United States marshal for the Territory of New Mexico, returned into court the said munition with the following return thereon, which is in words and figures following, to wit:

I hereby certify that I have served the within process, by taking possession of the property therein described, and by giving due notice, in the Sante Fe Gazette, to all persons claiming to appear and interpose their claims, and make their allegations in that behalf, on the 1st Monday, the 6th day of November, A. D.
13 1865, at the U. S. 3d judicial district court, La Mesilla, N. M., Nov. 6th, 1865.

ABRAHAM CUTLER,
U. S. Marshal.

And afterwards, to wit: on the 11th day of November, A. D. 1865, John S. Gillett, claimant to a portion of said property, filed in open court a bond for the payment of costs in said suit, which bond is in words and figures following, to wit:

Know all men by these presents, that we, John S. Gillet and Frank D. E. Ryster and Francis Blake, are held and firmly bound unto the United States of America in the sum of two hundred and fifty dollars, lawful money of the said United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 11th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas, a libel has been filed in the district court of the United States of America for the the third judicial district of the Territory of New Mexico, on the twenty third day of September, in the year of our Lord one thousand eight hundred and sixty-five, by
14 Theodore D. Wheaton, esq., attorney for the United States for the Territory of New Mexico, against a certain grant or tract of land known as the Ponce grant; upon a portion of which is situated the town of Franklin, El Paso county, in the State of Texas, also an undivided seven-eighths of twenty-nine whole blocks, and forty separate lots in said town of Franklin, Texas; also survey No. 146, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, for reasons and causes in said libel mentioned, and praying that the same may be condemned as forfeited to the uses in said libel specified; and whereas, also a claim has been filed in said court by the said John S. Gillett, as owner of said property; now, therefore, the condition of the above obligation is such that in case the said John S. Gillett shall not support his own claim, if the said John S. Gillett, and the said Frank De Ryster, and Francis Blake, or either of them, or the heirs, executors, or administrators of the said John S. Gillett, and the said Frank De Ryster, and Francis Blake, or either of them, shall pay all such costs, as by his reason of his failure

to support his said claim he ought to pay, then this obligation to be null and void, otherwise to remain in full force and effect.

[SEAL.] JOHN S. GILBERT.
[SEAL] F. DE RYTTER.
[SEAL.] FRANCIS BLKE.

15 The penalty and sureties of the above bond is approved by me this 11th day of November, 1865.

SAM. J. JONES, *Clerk.*

And afterwards, to wit: on the 17th day of November, A. D. 1865, Henry S. Gillett, claimant to a portion of said property, filed in open court a bond for the payment of costs which bond is in words and figures following, to wit:

Know all men by these presents, that we, Henry S. Gillett, and Thos. J. Bull, and H. Granogian, are held and firmly bound to the United States of America, in the sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 11th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas a libel has been filed in the district court of the United States of America for the third judicial district of the Territory of New Mexico, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-five, by Theodore D. Wheaton, esq., attorney of the United States for the Territory of New Mexico, against a certain seven-eighths interest in and

16 to a certain grant or tract of land known as the Ponce grant, upon a portion of which is situated the town of Franklin, in El Paso county, State of Texas; also an undivided seven-eighths of twenty-nine whole blocks, and forty separate lots in said town of Franklin, Texas; also survey No. 146, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, for reasons and causes in the said libel mentioned, and praying that the same may be condemned and forfeited to the uses in the said libel specified, and whereas, also, a claim has been filed in the said court by the said Henry S. Gillett, as owner of said property.

Now, therefore, the condition of the above obligation is such that in case the said Henry S. Gillett shall not support his said claim, if the said Henry S. Gillett, and the said Thos. J. Bull, and H. Granogian or either of them, or the heirs, executors, or administrators of the said Henry S. Gillett, and the said Thos. J. Bull, and H. Grungian, or either of them, shall pay all such costs as by reason of his failure to support his said claim he ought to pay, then this obligation to be null and void, otherwise to remain in full force and effect.

[SEAL.] HENRY S. GILLETT.
[SEAL.] THOS. J. BULL.
[SEAL.] H. GRANIGIAN.

county of Dona Ana, in said district, on the first Monday of November, A. D. 1865, the following proceedings were had and held to wit: On the 9th day of November, A. D. 1865, Abraham Cutler, United States marshal for the Territory of New Mexico, returned into court the said munition with the following return thereon, which is in words and figures following, to wit:

I hereby certify that I have served the within process, by taking possession of the property therein described, and by giving due notice, in the Sante Fe Gazette, to all persons claiming to appear and interpose their claims, and make their allegations in that behalf, on the 1st Monday, the 6th day of November, A. D.
13 1865. at the U. S. 3d judicial district court, La Mesilla, N. M., Nov. 6th, 1865.

ABRAHAM CUTLER,
U. S. Marshal.

And afterwards, to wit: on the 11th day of November, A. D. 1865, John S. Gillett, claimant to a portion of said property, filed in open court a bond for the payment of costs in said suit, which bond is in words and figures following, to wit:

Know all men by these presents, that we, John S. Gillet and Frank D. E. Ryster and Francis Blake, are held and firmly bound unto the United States of America in the sum of two hundred and fifty dollars, lawful money of the said United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 11th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas, a libel has been filed in the district court of the United States of America for the the third judicial district of the Territory of New Mexico, on the twenty third day of September, in the year of our Lord one thousand eight hundred and sixty-five, by
14 Theodore D. Wheaton, esq.. attorney for the United States for the Territory of New Mexico, against a certain grant or tract of land known as the Ponce grant; upon a portion of which is situated the town of Franklin, El Paso county, in the State of Texas, also an undivided seven-eighths of twenty-nine whole blocks, and forty separate lots in said town of Franklin, Texas; also survey No. 146, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, for reasons and causes in said libel mentioned, and praying that the same may be condemned as forfeited to the uses in said libel specified; and whereas, also a claim has been filed in said court by the said John S. Gillett, as owner of said property; now, therefore, the condition of the above obligation is such that in case the said John S. Gillett shall not support his own claim, if the said John S. Gillett, and the said Frank De Ryster, and Francis Blake, or either of them, or the heirs, executors, or administrators of the said John S. Gillett, and the said Frank De Ryster, and Francis Blake, or either of them, shall pay all such costs, as by his reason of his failure

to support his said claim he ought to pay, then this obligation to be null and void, otherwise to remain in full force and effect.

[SEAL.] JOHN S. GILBERT.
[SEAL] F. DE RYTTER.
[SEAL.] FRANCIS BLKE.

15 The penalty and sureties of the above bond is approved by me this 11th day of November, 1865.

SAM. J. JONES, *Clerk.*

And afterwards, to wit: on the 17th day of November, A. D. 1865, Henry S. Gillett, claimant to a portion of said property, filed in open court a bond for the payment of costs which bond is in words and figures following, to wit:

Know all men by these presents, that we, Henry S. Gillett, and Thos. J. Bull, and H. Granogian, are held and firmly bound to the United States of America, in the sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 11th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas a libel has been filed in the district court of the United States of America for the third judicial district of the Territory of New Mexico, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-five, by Theodore D. Wheaton, esq., attorney of the United States for the Territory of New Mexico, against a certain seven-eighths interest in and
16 to a certain grant or tract of land known as the Ponce grant, upon a portion of which is situated the town of Franklin, in El Paso county, State of Texas; also an undivided seven-eighths of twenty-nine whole blocks, and forty separate lots in said town of Franklin, Texas; also survey No. 146, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, for reasons and causes in the said libel mentioned, and praying that the same may be condemned and forfeited to the uses in the said libel specified, and whereas, also, a claim has been filed in the said court by the said Henry S. Gillett, as owner of said property.

Now, therefore, the condition of the above obligation is such that in case the said Henry S. Gillett shall not support his said claim, if the said Henry S. Gillett, and the said Thos. J. Bull, and H. Granogian or either of them, or the heirs, executors, or administrators of the said Henry S. Gillett, and the said Thos. J. Bull, and H. Grungian, or either of them, shall pay all such costs as by reason of his failure to support his said claim he ought to pay, then this obligation to be null and void, otherwise to remain in full force and effect.

[SEAL.] HENRY S. GILLETT.
[SEAL.] THOS. J. BULL.
[SEAL.] H. GRANIGIAN.

17 The penalty and sureties of the above bond are approved by me, this, the 17th day of November, A. D. 1865.

SAM. J. JONES, *Clerk*.

And afterwards, to wit, on the 22d day of November, A. D. 1865, the following proceedings were had in said court, to wit:

UNITED STATES

vs.

CERTAIN lands, lots, etc., etc., situated in El Paso county, Texas, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett.

This cause came on to be heard on the motion of Messrs. Clever & Elkins, proctors for claimants herein, to quash the monition, return of the marshal therein, and the publication in this case, for reasons stated and set forth in said motion; which said motion was argued by counsel, on the part of the United States as well as on the part of the said claimants, and the court being fully advised in the premises, overruled said motion. The said claimants, by their said proctors, excepted to the opinion of the court in overruling said motion, and a bill of exceptions having been signed by the presiding judge of this court, is ordered to be filed with the papers in this cause.

And afterwards, to wit, on the 23d day of September, A. D.
18 1865, claimants, by their attorneys, filed in open court a bill of exceptions, which said bill of exceptions is in words and figures following, to wit:

In admiralty.—In the district court for the third judicial district of the Territory of New Mexico, November term, A. D. 1865.

THE UNITED STATES

vs.

THE PROPERTY seized upon by the U. S. marshal, and libelled as the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, situated in the county of El Paso, State of Texas.

Be it remembered, that on the hearing of this cause, the proctors for Henry S. Gillett and John S. Gillett, claimants of the property herein, made the following motion, which said motion is in words and figures following, to wit:

In the United States district court for the third judicial district of the T'y of New Mexico, November term, A. D. 1865.

THE UNITED STATES

vs.

PROPERTY seized upon by the United States marshal, and libelled as the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, situated in El Paso county, Texas.

And now appear in open court Clever and Elkins, proctors of this court, and att'ys for claimants, for the purposes of this motion,

19 and no other, and move the court to quash the monition, return, and publication, for the following reasons:

1st. Said monition does not authorize the said United States marshal to attach the property therein described, as required by law.

2d. The said monition is contrary to the facts set forth in the libel herein, and totally insufficient.

3d. No notice of seizure and libel has been posted up in a public manner, for the space of fourteen days, near the place of seizure, as required by law.

4th. That the said United States marshal has not specially summoned and notified the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett to appear before said court, as commanded to do in said monition.

5th. There has been no order of said court made in said libel, authorizing notice to be given of the seizure and libel of the property herein mentioned.

6th. No publication of the cause of libel has been made, as required by law.

7th. The cause of libel contained in the publication herein, is a different cause from the one set forth and relied upon in said libel.

8th. Said service and publication has not been made by the officer designated by law to make the same.

9th. There is no proof of publication herein, as required
20 by law, and for other good and sufficient reasons.

CLEVER & ELKINS, *pro Motion.*

Which said motion, after being argued by the district attorney on the part of the United States, and the proctors for said claimants, was then and there overruled by the court; to the opinion of the court in overruling said motion the claimants, by their proctors, except, and ask this their bill of exceptions to be signed, sealed, and made part of the record herein, which is done accordingly.

[SEAL.] J. HOUGHTON, *Judge.*

And afterwards, to wit, on the 20th day of November, A. D. 1865, the following information was filed with the clerk of said court, which said information is in words and figures following, to wit:

FRANKLIN, TEXAS, *July 16th*, 1864.

THEODORE D. WHEATON, Esq., *U. S. district attorney:*

SIR: I have the honor to inform you that I have this day seized the following described real estate and property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, persons who have, by their disloyal and treasonable acts, rendered their property, estate, credits, and moneys liable to confiscation under the law approved July 17th, 1862, viz: a certain seven-eighths interest
21 in and to a certain grant or tract of land known as the Ponce grant, upon a portion of which is situated the town of Franklin, El Paso county, Texas, bounded on the north by survey No. 146 and No. 9; on the east by the land of James McGoffin; on the south

by the Rio Grande; and on the west by the lands of Simeon Hart; also the whole of survey No. 146, with the exception of that portion within the limits of the town site of the town of Franklin, Texas; also an undivided seven-eighths of the following lots in the town of Franklin, Texas, viz:

Lots No. 2, 3, 4, 5, and 6 in block No. 1.
Lots No. 8, 9, 10, and 11 in block No. 2.
Lots No. 14, 15, and 17 in block No. 3.
Lots No. 19, 23, and 24 in block No 4.
Lots No. 25 and 26 in block No. 5.
The whole of blocks No. 7, 8, 9, and 10.
Lots No. 60, 61, and 62 in bl'k No. 11.
The whole of block No. 12.
Lots No. 69, 70, and 74 in block No. 13.
Lots No. 84, 85, and 90 in block No. 15.
Lots No. 95 and 96 in block No. 17.
Lots No. 101, 102, 103, and 104 in block No. 18.
The whole of blocks No. 19, 20, 21, 22, 23, 24, and 25.
Lots No. 130 and 137 in block No. 27.
Lots No. 131 and 136 in block No. 28.
Lots No. 122, 128, and 133 in block No. 30.

The whole of blocks No. 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51, houses, corrals, &c.; and I respectfully request that proceedings may be instituted that the above property may be condemned, and that this notice may be filed
22 with papers in the case.

I am, sir, yours, &c.,

A. CUTLER, *Captor.*

And afterwards, to wit, on the day and year last aforesaid, the following publication, which was published in the Santa Fe Weekly Gazette for three successive weeks, was filed in said court, which said publication is in the words and figures following, to wit:

United States marshal's proclamation.

UNITED STATES OF AMERICA,
3d Judicial District of the Territory of N. M., ss:

I, Abraham Cutler, marshal of the United States for the Territory of New Mexico, do hereby give public notice that, in the case of

THE UNITED STATES, libellant,

Against

THE PROPERTY of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, to wit, the following property in El Paso county, State of Texas, viz:

A certain seven-eighths interest in and to a certain tract of grant of land known as the Ponce grant, upon a portion of which is situated the town of Franklin, in said county and State, and described as follows, to wit:

Bounded on the north by surveys No. 146 and No. 9; on the east by the land formerly of James Magoffin; on the south by the
23 Rio Grande, and on the west by the land formerly of Simeon Hart.

Also, the whole of survey No. 146, with the exception of that portion within the limits of the town site of Franklin aforesaid.

Also, an undivided seven-eighths of the following lots in the aforesaid town of Franklin, to wit:

Lots No. 2, 3, 4, 5, and 6 in block No. 1.
Lots No. 8, 9, 10, and 11 in block No. 2.
Lots No. 14, 15, and 17 in block No. 3.
Lots No. 19, 23, and 24 in block No. 4.
Lots No. 25, and 26 in block No. 5.
The whole of blocks No. 7, 8, 9, and 10.
Lots No. 60, 61, and 62 in block No. 11.
The whole of block No. 12.
Lots No. 69, 70, and 74 in block No. 13.
Lots No. 94, 85, and 90 in block No. 15.
Lots No. 95, and 96 in block No. 17.
Lots No. 101, 102, 103, and 104 in block No. 18.
The whole of block No. 19, 20, 21, 22, 23, 24, and 25.
Lots No. 130, and 137 in block No. 27.
Lots No. 131, and 136 in block No. 28.
The whole of block No. 29.
Lots No. 122, 128, and 133 in block No. 30.

The whole of blocks No. 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51, with all the houses, corrals, &c., thereon.

The same being libelled in the United States district court for the 3d judicial district of the Territory of New Mexico in a case of seizure and forfeiture for alleged violation of the acts of Congress approved July 13th, 1861, and at other times since that time; and I hereby give further notice that the time assigned for the return of
24 said warrant and the hearing of this cause is the first Monday, the sixth day of November, A. D. 1865, and I hereby admonish and summon all persons claiming any interest in said property or knowing or having anything to say why the same should not be decreed to be forfeited to the United States, and be condemned and sold to answer the prayer of said libel that they be and appear before said district court at the court house in La Mesilla in said district, on the 6th day of November, A. D. 1865, at 10 o'clock a. m., when and where said cause will be heard, then and there to interpose their claims, and answer said libel, and make there allegation in that behalf.

La Mesilla, New Mexico, September 2d, 1865.

ABRAHAM CUTLER,
U. S. Marshal.

No. 12 st.

And afterwards, to wit: on the 24th day of November, A. D. 1865, the following proceedings were had in said court, to wit:

UNITED STATES
vs.
CERTAIN town lots, lands, &c., situate in El Paso county, Texas, the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett.

And now on this day comes the said libellees, by their attorneys, Clever & Elkins, esqs., their proctors, and in open court ask leave of the court to file their claims to said property herein, to filing
25 of which said claims the United States by her district attorney objected, and the court sustained said objection, whereupon the said proctors, for said libellees, excepted to the opinion of the court, and asked the court to sign a bill of exceptions herein, which was refused by the court.

The said Clever & Elkins, proctors as aforesaid, then offered to file the said libellees' plea to the jurisdiction of the court in this cause, to the filing of which plea the United States by her district attorney objected, and the court sustained said objections. Whereupon the said proctors, for the said libellees, excepted to the opinion of the court in refusing said plea to be filed, and asked the court to sign a bill of exceptions herein, which was refused by the court. And no other claimants appearing, the court being satisfied that publication has been duly made in the Santa Fe Gazette, a newspaper published in the Territory of New Mexico, for three consecutive weeks ending on the 28th day of October, A. D. one thousand eight hundred and sixty-five, notifying all claimants to appear at this term of this court and establish their claims. Whereupon C. P. Clever, esq., one of the proctors of this court, appeared and stated that he appeared for the libellees of the property libelled herein, and was ready to show cause why the said property should not be condemned as forfeited.

The court refused any appearance for the said libellees of said
26 property to be made, and no further or other claimants appearing, and after proclamation to like effect made by the marshal in open court, it is ordered, adjudged, and decreed that a decree of default be entered herein, and that testimony be taken before the commissioner to be reported at the present term of this court.

And, afterwards to wit: on the 2nd day of December, A. D. 1865, the commissioner appointed to take testimony by the court, filed with the clerk of said court the following evidence in said cause, which said evidence is in words and figures following, to wit:

United States district court.—November term, 1865, in admiralty.

UNITED STATES OF AMERICA,
3d Judicial District of the Territory of New Mexico:

THE UNITED STATES, libellant,

vs.

A $\frac{7}{8}$ INTEREST in a certain tract of land known as the Ponce grant, upon a portion of which is situated the town of Franklin; also the whole of survey No. 146 with the exception of that portion within the limits of the town of Franklin. Also an undivided $\frac{7}{8}$ interest in the following lots in said town of Franklin: lots No. 2, 3, 4, 5, and 6 in bl'k No. 1; lots No. 8, 9, 10, and 11 in bl'k No. 2; lots No. 14,
27 15, and 17 in bl'k No. 3; lots No. 19, 23, and 24 in bl'k No. 4; lots No. 25, and 26 in bl'k No. 5. The whole of bl'ks No. 7, 8, 9, and 10; lots No. 60, 61, and 62 in bl'k No. 11. The whole of block No. 12; lots No. 70, 69, and 74 in bl'k 13; lots No. 94, 85, and 90 in block 15; lots No. 85 and 93 in bl'k 17; Lots No. 101, 102, 103 and 104 in bl'k 18. The whole of blocks No. 19, 20, 21, 22, 23, 24, and 25. Lots No. 130 and 137 in bl'k No. 27: lots No. 131, and 136 in bl'k No. 28. The whole of bl'k No. 29. Lots No. 122, 128, and 133 in bl'k No. 30. The whole of blocks No. 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51, with all the houses and corrals, &c., situated thereon, all of which said property is situated in the county of El Paso and State of Texas, and is more fully described in the libel in this cause, and is libelled as the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett.

Testimony of witnesses, taken in the above-entitled cause taken before me, the undersigned United States commissioner, at my office in the town of La Mesilla, in the third judicial district of the Territory of New Mexico, November the 29th, A. D. 1865.

David Sperry, of lawful age and sound mind, being by me first duly sworn, deposed as follows:

28 I have known Josiah F. Crosby, the libellee in this case, for the last eight years. He was an armed secessionist in the year 1862. He acted as quartermaster for the rebel General Henry H. Sibley's brigade in El Paso county, Texas, 1862, and also as aid to said Sibley. He went south with said brigade in 1862, when it left El Paso county, Texas, and has not since returned, to my knowledge. He was a citizen of the United States.

I have known Simeon Hart, one of the libellees in this case from 1854 to 1862. When I first knew him he was a large contractor under the government of the United States. He was a man of great wealth, and the most influential man in El Paso county, Texas. He made the greater part of his wealth as a contractor under the government of the United States. He was a strong advocate of the rebel cause in 1861, entertained and harbored rebel officers frequently, and generally at his house, in 1861 and 1862, in El Paso county, Texas. I heard say to the people of El Paso county, to induce them to vote

for secession in 1861, that it was no use to wait to see what President Lincoln would do, but that now was the time for them to act, and to all act in concert and vote for secession. It was a matter of public notoriety and conversation in the town of El Paso, Texas, where Mr. Hart lived, that he hired persons to go to El Paso in the republic of Mexico to kidnap W. W. Mills, now collector of
29 customs at El Paso, Texas, and deliver him to the rebel forces at Fort Bliss. Said Hart never denied the above statement and report, to my knowledge. He furnished flour to the rebel troops at Fort Bliss in 1861. He went to San Antonio in the interior of Texas with the rebel General Sibley's brigade in 1862, and has not since returned. He was a citizen of the United States.

D. SPERRY.

Cross-ex. by J. B. Elkins, esq.—see page .

The United States district att'y objects to appearance of counsel for libellees.

William W. Mills, United States collector of customs at El Paso, Texas, being by me first duly sworn as hereinafter certified, deposes as follows:

I have known Henry S. Gillett and John S. Gillett, libellees in this cause since 1859. They were merchants in the town of Franklin, El Paso county, Texas, at the breaking out of the rebellion. They were among the most active and earnest advocates and supporters of the rebellion, both before and after the confederate forces came up into El Paso county. I saw the said Gilletts assist others to take forcibly from the post office at Franklin, in said county and State, the United States mail, for the purpose of intercepting and destroying orders to United States officers, in 1861. Upon one occasion Henry S.
30 Gillett showed me a rope in the United States post office in the said town of Franklin, and told me that they had got that rope to hang just such Union men as I was, and that I had better look out. I have seen the said Gilletts assist in raising a secession flag, and hang the late President of the United States in effigy. Said Henry S. Gillett went south with the rebel General Sibley's brigade, and the said John Gillett went soon after. I first knew Simeon Hart, one of the above named libellees, in the year 1858. He was a government contractor under the government of the United States. He then lived in El Paso county, Texas. He was a man of wealth, and more instrumental than any other man in initiating the secession movement in that county. I heard him speak often of rebellion, and heard him say on the streets of El Paso, Texas, "Champagne for secessionists and a halter for Union men;" said offered and paid a reward to the party who kidnapped me in the town of El Paso, in the republic of Mexico, and delivered me to the confederate forces at Fort Bliss in 1861. He supplied flour to the confederate troops at Forts Bliss and Fillmore in 1861. He went south with Sibley's brigade in 1862. I have since seen orders in the Texas newspapers signed by him as major in the C. S. A., and commissioner for the

sale of cotton. I never heard of any reason for my arrest as
31 above stated, except that I was a Union man. I was not tried for or charged with any crime. After having been brought from the republic of Mexico by the emissaries of the said Hart, I was confined at Fort Bliss for thirty days and treated with great cruelty and indignity. Colonel Baylor afterwards excused himself for so treating me by saying that Judge Hart had influenced him to do so. Said Hart received a large amount of bacon, the property of the United States, and turned it over to the confederate forces which were commanded by the rebel General Henry H. Sibley. Said Hart acquired most of his wealth by contracts under the United States government. I know that the property described in the libel in this case is the property of the libellees; the libellees in this case are citizens of the United States, and the said property libelled is situate in El Paso county, in the State of Texas. I have known Josiah F. Crosby, the libellee in this case, from 1858 to 1861 in El Paso county, State of Texas. He was judge of the 11th judicial district of the State of Texas, which included said El Paso county. He advised and advocated seccession in that county both before and after the arrival of the Texan forces. When I was a prisoner at Fort Bliss, charged with being a Union man, P. T. Herbert, esq., applied
32 to said Crosby, then judge as aforesaid, as counsel for me, for a writ of habeas corpus to release me. Judge Crosby refused to allow and issue the writ. I had previous to this time heard him discharge some United States soldiers from the service of the United States. In this decision he said that these soldiers being citizens of the State of Texas, and the State of Texas having seceded from the United States, they owed their allegiance to the State of Texas and were discharged from their obligations to the late United States government. He went with General Sibley's brigade to Texas in 1862. He was one of the joint owners of the property described in the libel in this case. He was a citizen of the United States. The said property is situated in El Paso county, State of Texas.

Cross-examined by S. B. Elkins, esq.:

Please state if you know whether any of the above named libellees since the 23d day of September, A. D. 1863, have been engaged in armed rebellion against the government of the United States; and whether or not since that date you have known whether either of the said libellees to furnish to rebels in arms against said government any arms, ammunition, clothing, stores, subsistence, or any other articles of property, or give any aid or comfort to the rebels in arms against the government of the United States for the purpose of being
33 used by said rebels in said rebellion.

Ans. I have not since the 23d day of September, A. D. 1863, saw either of the above-named libellees furnish to the rebel government any of the above-named articles, nor have I known, of my own personal knowledge, either of the said libellees since that date to give any aid or comfort to the said rebel government.

You stated in your direct examination that you saw the said Gilletts assist to take forcibly from the post office at Franklin, in said State, the United States mail for the purpose of intercepting and destroying orders to the United States officers in 1861. In what manner did the said Gilletts assist to take from the post office the mail as above stated; and how do you know that it was for the purpose of intercepting orders to Union officers, as stated in your direct examination?

The day this mail was taken from the post office at Franklin the secessionists held a meeting at the office of San Antonio Mail Co., where I was employed, and resolved by a vote to take the mail for the purpose stated by me; the Gilletts were present at this meeting and assisted in it. And I saw them go across the road to the post office with the said party, which demanded and took and opened said mail. I do not remember that I saw the Gilletts advise to take the mail, nor did I see them with their own hands take hold of the
34 mail. When I say assisted in taking the said mail, I mean they were present and went with the party that did take it.

Re-examined:

At the meeting that you speak of at which it was resolved to take the United States mail, did you hear the Gilletts express any disapprobation of the act?

Ans. I did not. I believe the said Gilletts took the oath of allegiance about two months ago at Franklin.

W. W. MILLS.

Abraham Cutler, United States marshal for the territory of New Mexico, being duly sworn, deposes and says:

I seized the property described in the libel in this case as the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett on the 16th day of July, A. D. 1864.

ABRAHAM CUTLER.

David Sperry, cross-examined by S. B. Elkins, esq.:

Please state if you know whether either of the above named libellees, Josiah F. Crosby or Simeon Hart, since the 23d day of September, 1863, have been engaged in armed rebellion against the government of the United States; and whether or not since that date you have known said libellees to furnish to rebels in arms against said government any arms, ammunition, clothing, stores, ammunition,
35 subsistence, or any other articles of property, or given any aid or comfort to rebels in arms against the government of the United States for the purpose of being used by said rebels in said rebellion.

Ans. I have not.

Re-ex. by U. S. dist att'y:

Do you know of either of said parties, since committing the rebellious acts testified to by you in your direct examination, have taken

the oath of allegiance to the government of the United States? and, if so, at what time?

I do not know that either of said parties have yet taken the oath of allegiance.

D. SPERRY.

I, W. O. Bacon, United States commissioner for the third judicial district of the Territory of New Mexico, hereby certify that the foregoing testimony was taken before me, at my office, in the town of La Mesilla, in said district, on the 27th day of November, 1865.

And that I then and there reduced said evidence to writing, and that the above-named witnesses were by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the above-entitled cause, then on hearing before me.

W. P. BACON, *U. S. Commissioner.*

36 MESILLA, N. M., *November 27th*, 1865.

And afterwards, to wit, on the 2nd day of December, A. D. 1865, the presiding judge of said court rendered a decree in said cause, which said decree appears of record in said court, and is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Territory of New Mexico, Third Judicial District.

UNITED STATES
vs.

A CERTAIN seven-eighths interest in and to a certain grant or tract of land known as the Ponce grant; also an individual seven-eighths of twenty-nine whole blocks and forty separate lots, in the town of Franklin, Texas; also survey number one hundred and forty-six, all of which said lands and real estate are situated in the county of El Paso and State of Texas, and the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett.

This cause came on to be heard upon the libel, exhibits, and testimony, and it appearing to the court that, although monition has been duly issued and proclamation made, and notice duly given at the door of the court house, calling upon all persons having aught to say why the property and estate described in said libel should not be condemned, and the court having heard the testimony in the case, and being now full advised in the premises, it is ordered, adjudged,
37 and decreed, that the property described in the libel in said cause, to wit: an undivided seven-eighths of a certain grant or tract of land, known as the Ponce grant or tract, upon a portion of which is situated the town of Franklin, in the county of El Paso, State of Texas, bounded on the north by surveys No. 146 and No. 9; on the east by the land of James McGoffin, on the south by the Rio Grande; and on the west by the lands of Simeon Hart.

Also all of survey number one hundred and forty-six, with excep-

tion of that portion within the limits of the town site of the town of Franklin, Texas. Also an undivided seven-eighths of the following lots in the town of Franklin, Texas: Lots No. 2, 3, 4, 5, and 6, in block No. 1; lots No. 8, 9, 10, and 11, in block No. 2; lots No. 14, 15, and 17, in block No. 3; lots No. 19, 23, and 24, in block No. 4; lots No. 25 and 26, in block No. 5. The whole of blocks No. 7, 8, 9, and 10. Lots No. 60, 61, and 62, in block No. 11; lots 60, 70, and 74, in block No. 13; lots No. 84, 85, and 9, in block 15; lots No. 95 and 96 in bl'k 17; lots No. 101, 102, 103, and 104, in block 18; lots No. 130 and 137 in bl'k 27; lots No. 131 and 136 in bl'k 28; lots No. 122, 128, and 133, in bl'k 30. The whole of blocks No. 12, 19, 20, 21, 22, 23, 24, 25, 29, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51; all of which said lots, land, and real estate, are situate in El Paso county, and State of Texas,
38 be condemned as forfeited to the United States, and that the same be sold at the public plaza of the town of Franklin, in the county of El Paso, Texas, by the marshal of the United States for the district of New Mexico, at public sale, to the highest bidder, for cash, after notice having been first given by printed or written handbills at least two weeks before the day of sale, posted up in public places in the towns of Franklin and San Elyini, Texas, and La Mesilla, and Las Cruses, New Mexico, and describing the property to be sold, and the times and places of sale.

That a deed be made by said marshal of the real estate thus sold to the purchasers, and that after the deduction and payment of all fees and costs accruing to said cause, one-half of the proceeds of said sale remaining shall be paid by the said marshal to the informant herein, Abraham Cutler, and the other half thereof shall be paid by the said marshal as soon as may be after said sale into the United States depository at Santa Fe, New Mexico, subject to and to abide the order of this court, in the premises at our next regular term.

J. HOUGHTON,

Associate Justice Supreme Court of New Mexico, and Presiding Judge of the 3rd Judicial District.

And afterwards, to wit, on the 2nd day of December, A. D.
39 1865, the following proceedings were had in said court at the term aforesaid, which said proceedings are in words and figures following, to wit:

And now appear Clever and Elkins, esq., attorneys for libellees and claimants, and ask the court for an appeal to the Supreme Court in this case; to their appearance for this purpose the district attorney objected, which objection was sustained by the court.

In the district court of the United States for the 3rd judicial district of the Territory of New Mexico.

UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, Samuel J. Jones, clerk of said court, do hereby certify that the foregoing forty pages is a full, true, and perfect copy of the record and proceedings had in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at La Mesilla, New Mexico, this the day of December, A. D. 1865.

[SEAL.] SAM. J. JONES, *Clerk.*

And be it further remembered, that on the day and year aforesaid, that the motion and affidavit filed by the said appellant on
40 the day and year aforesaid, are in words and figures following, to wit:

In the supreme court of the Territory of New Mexico, January term, A. D. 1866.

UNITED STATES
vs.

PROPERTY seized upon by the United States marshal, and libelled as the property of Henry S. Gillett, Simeon Hart, Josiah F. Crosby, and John S. Gillett.

And now comes the libellees and claimants to the property herein, Henry S. Gillett, John S. Gillett, Josiah F. Crosby, and Simeon Hart, by their attorneys, and ask leave of the court to enter the appeal herein, a perfect and true transcript of the record in said cause having been filed in this court, for the reason that the court below, which tried said cause, refuses and wrongfully disallowed an appeal in said cause to this court.

CLEVER, ASHURST & ELKINS,
For Claimants.

The affidavit is in words and figures following, to wit:

In the supreme court for said territory, January term, A. D. 1866.

UNITED STATES OF AMERICA, *Territory of New Mexico:*

Libel in the district court for the third judicial district of New Mexico.

UNITED STATES
vs.

41 PROPERTY seized upon by the U. S. marshal and libelled as the property of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, situate in El Paso county, Texas.

Charles P. Clever, one of the attorneys of this court, being duly sworn, upon his oath, states that in conjunction with S. B. Elkins, esq., an attorney of this court, he was employed to defend upon the part of the libellees in this cause, at the November term, A. D. 1865, in the district court for the third judicial district of the Territory of New Mexico, his honor, Joab Houghton, associate justice, presiding.

That after a decree of condemnation had been announced by the court, this affidavit, in open court, prayed for an appeal to the supreme court of this Territory in this cause, and offered to enter into court for that purpose as required by the court, as also to perfect the necessary affidavit for that purpose. This affidavit states that the said court refused to grant any appeal to the said libellees, and prohibited the said attorneys to appear for that purpose in this court.

C. P. CLEVER,

Sworn to and subscribed before me this 4th day of January, A. D. 1866.

W. W. GRIFFIN,
Deputy Clerk Supreme Court.

42 And be it further remembered, that on the day and year aforesaid, the appellants, by their attorneys, filed in open court the following assignment of errors in this cause, which is in words and figures following, to wit:

Assignment of errors.

In the supreme court of the Territory of New Mexico.—January term, A. D. 1866.

UNITED STATES

vs.

PROPERTY seized upon and libelled as the property of Simeon Hart, Josiah F. Crosby, Henry S. Gillett, and John S. Gillett, situate in El Paso county, Texas.

The libellees and claimants, Henry S. Gillett, John S. Gillett, Simeon Hart, and Josiah F. Crosby, to the property herein, by their attorney, for error assign the following:

1st. The court erred in entertaining jurisdiction over the property in question.

2d. The court erred in overruling the motion of libellees to quash the monition, return, and publication.

3d. The court erred in refusing to allow said libellees and claimants to file a plea to the jurisdiction of said court.

4th. The court erred in refusing to allow the said libellees to file a claim to said property.

5th. The court erred in refusing to said libellees an appeal
43 to the supreme court.

7th. The court erred in refusing to the libellees the right to show cause why their property was not confiscated.

8th. The court erred in refusing to the libellees the right to adduce evidence in their own behalf.

9th. The court erred in refusing to the libellees the right to trial by jury.

10th. The court erred in decreeing one-half of the proceeds of the sale of said property to Abraham Cutler, captor.

11th. The court erred in proceding as a court of admiralty.

CLEVER, ASHURST & ELKINS, *for Libellees.*

There is no error on the record.

WHEATON, *Dist. Att'y.*

And be it further remembered, that on the 6th day of January, A. D. 1866, it being the 6th day of said court, Theodore D. Wheaton, esq., United States district attorney, filed his joinder in error, which is in words and figures following, to wit:

Confiscation.

In the supreme court, New Mexico, Jan. term, A. D. 1866.

H. S., and J. S. GILLETT'S, property *vs.* THE UNITED STATES.

44 And now comes the United Siates, by her dist. att'y, and says there is no error in the record.

WHEATON, *for the U. S.*

And be it further remembered, that on the sixteenth day of January, A. D. 1866, it being the fourteenth day of said term, Theodore D. Wheaton, esq., U. S. dist. att'y, filed the following motion, to wit:

Confiscation appeal.

THE PROPERTY of Hart, Crosby, *et al.*, *vs.* THE UNITED STATES.

The district attorney moves the court to dismiss the appeal for the following reasons:

1st. There was no appearance in the court below.

2d. The judgment below was by default, and for other good and sufficient reasons.

WHEATON, *Dist. Att'y.*

Appeal from Dona Ana county.

Be it further remembered, that on the day and year aforesaid, the following procedings were had and held, to wit:

THE PROPERTY of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, appellants,

vs.

45 THE UNITED STATES, appellee.

And now, on this day, came again the parties by their counsel, and T. D. Wheaton, esq., United States district attorney, moves the court to dismiss the appeal in this case, which motion is overruled, and

thereupon the said Wheaton joins in error, and the parties, by their counsel, submit this cause to the court for its judgment and decree, without argument.

Therefore, in consideration of the premises, is is ordered, adjudged, and decreed by the court, that the judgment and decree in the court below, be, and hereby is, reversed and annulled, and this cause be remanded to the district court for the county of Dona Ana, to be by the said court dismissed, for the want of jurisdiction in the said court over the real estate in the county of El Paso, Texas, libelled in this cause, at the costs of the United States.

The judgment of the court was announced by Benedict, chief justice; Justice Houghton dissenting.

Leave is hereby given each of the judges to file their separate written opinions in this case, during the present term or in vacation.

Be it further remembered, that on the day and year aforesaid, the following proceedings were had and held:

Appeal from Dona Ana Co.

46 THE PROPERTY of Josiah F. Crosby, Simeon Hart, Henry S. Gillett, and John S. Gillett, appellants,

vs.

THE UNITED STATES, appellee.

And now comes Theodore D. Wheaton, esq., U. S. district attorney, and files an affidavit herein, showing the property in controversy in this cause to be of value exceding one thousand dollars, and thereupon prays an appeal to the Supreme Court of the United States, which appeal is hereby granted.

Be it further remembered, that on the day and year aforesaid, Theodore D. Wheaton. esq., U. S. dist. attorney, filed an affidavit, which is in words and figures following, to wit:

Appeal.

In the supreme court, N. M., Jan'y term, A. D. 1866.

THE PROPERTY of Josiah F. Crosby, Simeon Hart, *et al.*,

vs.

THE UNITED STATES.

Affidavit of John F. Stone, states that the property in question in the above-named cause exceeds the value of one thousand dollars, to wit, of the value of about six thousand dollars.

JOHN F. STONE.

Sworn to and subscribed in open court, Jan'y 16, 1866.

KIRBY BENEDICT,

47 *Chief Justice of said Territory and Presiding Judge of said Court.*

I, William M. Gwynne, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing forty-six pages, is a true, perfect, and exact transcript of the entries made in the record of the said court, in the above-entitled cause, as remains of record in said court, which said record is now in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Santa Fe, this, the 16th day of July, A. D. 1866.

[SEAL.] W. M. GWYNNE, *Clerk.*